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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

NO. 88-5909

DOCK McKOY, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER NORTH CAROLNA'S CAPITAL SENTENCING PROCEDURE, WHICH NARROWS THE CLASS OF DEATH ELIGIBLE MURDERS AND PROVIDES FOR CONSIDERATION OF ANY EVIDENCE IN MITIGATION BY THE SENTENCER AND WHICH DOES NOT MANDATE THE DEATH PENALTY, RATHER REQUIRES THE EXERCISE OF GUIDED DISCRETION, EVEN WHERE AGGRAVATING BUT NO MITIGATING FACTORS ARE FOUND, VIOLATES LOCKETT V. OHIO, 438 U.S. 586 (1978) BY PLACING THE BURDER UPON THE DEFENDANT TO PROVE THE EXISTENCE OF FACTORS IN MITIGATION UNANIMOUSLY BY A PREPONDERANCE OF THE EVIDENCE.

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Pursuant to the authority of Rule 27 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the Petition for Writ of Certiorari of Dock McKoy, and requests that this Court deny the relief sought by Petitioner on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

At the July 29, 1985 Session of Stanly County Superior Court, a Stanly County jury convicted Dock McKoy of the December 22, 1984 first-degree murder of Deputy Kress Horne. The jury then recommended a death sentence. In an opinion filed September 7, 1988, a majority of the Supreme Court of North Carolina found no error in either the guilt or sentencing stage of the trial. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988).

JURISDICTION

The jurisdiction of this Court has been properly invoked by Petitioner pursuant to 28 U.S.C. § 1257(3)(1982).

STATEMENT OF THE CASE

A. Procedural History

On December 22, 1984, Dock McKoy, Jr., shot Anson County Deputy Sheriff, Kress Horne, in the face. A grand jury from Anson County returned an indictment against McKoy for the first-degree murder of Deputy Horne on 7 January 1985. Venue was changed from Anson County to Stanly County. The case was then tried at the July 29, 1985 Criminal Session of Stanly County Superior Court before the Honorable William H. Truman, Judge Presiding, and a jury. At the conclusion of the guilt-innocence stage of the trial, the jury returned a verdict of first-degree murder based on the theory of premeditation and deliberation.

During the penalty phase, the jury unanimously found the presence of two aggravating factors and unanimously found that two of the eight submitted mitigating factors existed.

The jury then found unanimously and beyond a reasonable doubt that the aggravating factors found outweighed the mitigating factors found. The jury then found unanimously and beyond a reasonable doubt that the aggravating factors found, when considered with the mitigating factors found, were sufficiently substantial to warrant imposition of the death penalty. The jury then unanimously recommended that Dock McKoy receive the death penalty.

McKoy appealed his conviction to the Supreme Court of North Carolina. The case was first argued on March 14, 1988. After this Court's issuance of its opinion in Mills v. Maryland 486 U.S._____, 108 S.Ct. 1860, (1988), the Supreme Court of North Carolina on June 13, 1988, ordered further briefing in light of Mills v. Maryland and on July 28, 1988 ordered additional oral argument of this case for August 22, 1988. On September 7, 1988, a majority of the Supreme Court found no error in the guilt phase of the case and also found no error in the sentencing phase. Specifically, the Supreme Court of North Carolina held, in a 5-2 opinion, that the requirement in North Carolina that mitigating factors be found unanimously to exist was not violative of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. State v.

McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988). McKoy petitioned this Court for a Writ of Certiorari on November 15, 1988 to review this issue.

B. The Trial Proceedings

The evidence at trial tended to show the following:

On December 22, 1984, 65 year old Dock McKoy lived in a neighborhood just outside of the town of Wadesboro in Anson County, North Carolina. That morning, McKoy's next door neighbor, Haywood Haskell was outside working on his wife's vehicle. He observed McKoy come out onto his porch and fire his shotgun into the air twice. Haskell suggested to McKoy that he ought not shoot his shotgun since children were playing in the area. McKoy rebuffed him by stating that "everyone else is shooting" and that it was Christmas.

Haskell then telephoned the Anson County Sheriff's Department to report the shootings. Officer Calvin Lambert of the Anson County Sheriff's Department responded to the call. He was in uniform and drove a marked patrol vehicle. Deputy Lambert first spoke with Haskell who informed Lambert that McKoy had gone back into his home. Deputy Lambert then went onto McKoy's porch and talked to him through the screen door. McKoy did not come out of his house despite Lambert's request that he do so. Lambert told McKoy not to shoot the shotgun because he, McKoy, was drunk. McKoy mumbled something in reply but Lambert initially could not understand him. Then McKoy asked Deputy Lambert if he could shoot his shotgun in the woods. Deputy Lambert, who believed from McKoy's mannerisms that he had been drinking, told him to sober up before he shot the gun again. Lambert then returned to his patrol vehicle, observed McKoy's home for several minutes, and then left the area.

Later in the afternoon, Haskell observed McKoy fall down on the hill leading from his outhouse to his home. Due to rain, the hill was somewhat slick. A neighbor helped McKoy, who could not stand unaided, back to his home. McKoy had locked himself out and had to gain entry into his home by prying open a front window. Not long after that McKoy asked twelve year old neighbor

Mark "Duke" Cox who was at Mr. Haskell's home to come over and help him fix the window he had pried open to get back in his house. After the young boy attempted to assist McKoy, and then returned to Haskell's yard, McKoy accused Cox of stealing his money. When the boy denied it, McKoy fired a shot towards Mark Cox. Cox ran home. McKoy walked after him and fired twice more in the direction of Cox and some other children. He actually hit Lilly Smith, Cox's adult sister, with one of the pellets. McKoy went into Cox's home with his shotgun and angrily confronted Ms. Smith concerning the money. When she told McKoy that Cox did not have his money, McKoy told her to be quiet or he would shoot her. After McKoy finally left her house, Lilly Smith (Mark Cox's sister) called the Sheriff's Department to report the shooting. Haywood Haskell also telephoned the Sheriff's Office because he believed McKoy was going to injure someone. Two Anson County Sheriff's Deputies - Kress Horne and Robert Usery - responded to the call at approximately 4:45 p.m. They arrived in a marked patrol vehicle and were in uniform. After speaking to Haskell, they called for Dock McKoy to come out of his house so they could talk to him. McKoy ordered the officers to leave or he would kill them. Deputy Horne again asked McKoy to come out so they could straighten out the incident. McKoy refused. He stated he would come out if the officers left.

More officers arrived, and Usery talked to several of the people struck by the shotgun pellets previously fired by McKoy. Horne continued to try to talk to McKoy about coming out of his house. Horne drew his service revolver and braced himself across the patrol vehicle, but did not attempt to use his weapon. McKoy pushed open his screen door and shot Deputy Horne full in the face with his shotgun. McKoy gave no warning to Deputy Horne before firing the shot. Deputy Horne died on December 23 from this wound.

The officers surrounded McKoy's house. McKoy was ordered to throw his weapon outside, but he refused to respond. He was warned if he did not surrender, tear gas would be used. He still did not respond. A deputy then threw a tear gas canister through

McKoy's window. McKoy fired several more shots from inside his house.

The officers returned a short burst of fire. McKoy walked out onto his porch carrying his .20 gauge single shot shotgun. The officers quickly disarmed him and took him into custody. The officers then took McKoy to the Anson County Hospital to be treated for two wounds he received during the exchange of gun fire.

A search of McKoy's house revealed several empty liquor bottles as well as a number of expended and unexpended shotgun shells.

At the hospital, Dr. Merceda Perry treated McKoy Perry found McKoy had sustained a deep flesh wound on his forehead and puncture wound to his buttocks. Initially, Dock McKoy had a strong odor of alcohol and was incoherent. At 6:30, his blood alcohol was .26. However, Dr. Perry gave McKoy three quarters of a quart of fluid. McKoy rapidly became more coherent. Dr. Perry did not give McKoy any pain medication while treating him because he did not seem to be uncomfortable. Dr. Perry sutured McKoy's head wound and cleaned the buttock wound. McKoy admitted to Dr. Perry that he had drunk a pint of liquor and shot a police officer who was pressuring him. At 8:15 p.m., Dr. Perry released McKoy into the custody of Carl Jackson, a State Bureau of Investigation Agent, along with two deputies.

The officers first took McKoy to the Anson County Sheriff's Department so that warrants for charges arising from the shootings could be served on him. Then they left in a van to take McKoy to Central Prison in Raleigh, North Carolina. The officers told McKoy they were taking him to Raleigh for safe keeping. McKoy's head was bandaged so that his left eye was partially obscured. He was blind in his right eye. He complained of thirst so they stopped the van and purchased two soft drinks for McKoy. He drank both bottles. At this time, he was sitting up by himself in the van.

At approximately 8:43 p.m., Officer Jackson read McKoy his Miranda rights. McKoy acknowledged he knew his rights, that he

had been tried for his life at one time.[1] McKoy refused to sign a waiver since he could not see the waiver form, but orally waived his rights. McKoy stated he killed Deputy Horne because Horne was pressuring him. At the time McKoy made the statements, in Officer Jackson's opinion, McKoy appeared sober and was not under the influence of medication. McKoy appeared comfortable. When McKoy stated he was cold, the heat in the van was turned up and a sheet was placed on McKoy. When McKoy made a statement that he was concerned for his life, he was reassured by the officers that he would not be harmed.

At one point, he also complained of a stiffness in his hip. When McKoy stated he was tired and his hip was aching, questioning ceased.

McKoy presented evidence from Dr. Bob Rollins who stated, in his opinion, McKoy's personality disorder, when combined with his low level of intellectual functioning-- he scored 74 on an IQ test given prior to trial (in 1980, he had scored 89 on an IQ test)--and his drunkenness caused the defendant to have been unable to know right from wrong when he shot Deputy Kress Horne. Dr. Rollins admitted that McKoy had satisfactorily held a job for the four years preceding the shooting.

McKoy took the stand and denied shooting the officer. He stated the Sheriff had come to his house and had started shooting into his door. He stated the Sheriff kept trying to serve warrants on a Paul McKoy, not him. McKoy stated he had not been drinking on December 22. On cross-examination, McKoy admitted that he was convicted for the December 26, 1976 non-fatal shootings of Jackie Nicholson, William Everett, and Mark Bostus with a .12-gauge shotgun.

The jury returned a verdict of guilty of first degree murder.

At the sentencing phase of the trial, the State introduced evidence of Dock McKoy's November 28, 1952 guilty plea to second-degree murder in Scotland County.

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1 State v. McKoy, 236 N.C. 121, 71 S.E.2d 921 (1952).

McKoy introduced evidence through Drs. Patricio Lara and Bob Rollins, both psychiatrists, that on December 22, 1984, McKoy was impaired in his ability to conform his conduct to the requirements of the law due to his intoxication, his limited intellectual functioning, and his personality disorder. Dr. Lara did admit when he spoke with McKoy during the examination, his thought process was coherent and he found no evidence of hallucinations, delusions, or psychosis.

Dr. Rollins testified that in his opinion McKoy was under the influence of an emotional or mental disturbance when he shot the officer. He testified that McKoy had high blood pressure and was blind in his right eye and that had some effect on his personality disorder.

The Court in sentencing submitted the following issues to the jury:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: Yes.

1. Had Dock McKoy been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER: Yes.

* * *

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes.

* * *

1. This murder was committed while Dock McKoy was under the influence of mental or emotional disturbance.

ANSWER: No.

2. The capacity of Dock McKoy to appreciate the criminality of his

conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: Yes.

3. The age of Dock McKoy at the time of this murder is a mitigating circumstance.

ANSWER: No.

4. That for several decades Dock McKoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER: No.

5. That Dock McKoy has borderline intellectual functioning with an IQ test score of 74.

ANSWER: Yes.

6. That Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER: No.

7. Dock McKoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER: No.

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

* * *

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: Yes.

* * *

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: Yes.

Based on the answers given to these issues, the jury unanimously recommended a sentence of death.

REASONS WHY THE WRIT OUGHT NOT ISSUE

NORTH CAROLINA'S REQUIREMENT THAT A DEFENDANT BEAR AN BURDEN OF PROOF AS TO SATISFY ALL THE JURORS AS TO THE EXISTENCE OF A FACTOR IN MITIGATION DOES NOT VIOLATE THE HOLDING OF EITHER MILLS V. MARYLAND OR LOCKETT V. OHIO.

Petitioner contends that Mills v. Maryland, 486 U.S.____, 108 S.Ct. 1860, (1988), requires summary reversal of this case since the Supreme Court of North Carolina allegedly has misperceived or refused to acknowledge this Court's holding in that case. However, the State submits that while Mills precludes the unanimity instructions given in that case in the context of the Maryland statute, this precedent ought not be expanded to prohibit North Carolina's requirement that mitigating factors be found unanimously in order to be used in the final balancing steps of the North Carolina death penalty sentencing proceedings.

In 1972, this Court in Furman v. Georgia, 408 U.S. 238 (1972), struck down various states' death penalty statutes because of the unbridled discretion given the sentencer by those statutes. The various states, in passing new capital punishment statutes, promulgated several distinct types of sentencing procedures to cure the defects addressed in Furman. See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Lowenfield v. Phelps , 484 U.S. ____, 108 S.Ct. 546 (1988), but see, Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Generally, despite the different procedures present in the statutes, the Court has held that so long as a sentencing scheme "narrows the class of death eligible murders and then at the sentencing allows for consideration of mitigating circumstances and the exercise of discretion", the statute passes constitutional muster. Lowenfield v. Phelps, 484 U.S. at 108 S.Ct. 546 (1988). As the Court several times has made clear, "we are unwilling to say that there is any one right way for a state

to set up its capital punishment scheme." Spaziano v. Florida, 468 U.S. 447, 464 (1984).

The Court has expressly stated that no specific standards for balancing mitigating and aggravating factors are constitutionally required. See Zant v. Stephens, 462 U.S. 862; Franklin v. Lynaugh, 486 U.S._____, 108 S.Ct. 2320 (1988). However, conduct which is constitutionally tolerable under one sentencing scheme may not pass constitutional muster under another. For example, proportionality review is not constitutionally mandated. Pulley v. Harris, 465 U.S. 37 (1984). However, the presence or absence of such a review in a state's sentencing process has been found to be an important factor in determining whether the Constitution requires a death sentence must be overturned when one of several aggravating factors are subsequently ruled to have been improperly found. See Zant v. Stephens, supra. Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853 (1988). Likewise, the type of balancing employed by the State in reaching a death sentence determination can determine what types of sentencing errors may later be deemed harmless. Barclay v. Florida, 463 U.S. 939 (1983). See also, Johnson v. Mississippi, 486 U.S. ____, 108 S.Ct. 1981 (1988), (Rehnquist, J., concurring). [2]

In Maryland, when the sentencer finds an aggravating factor unanimously to exist, but no mitigating factor is found, the jury, without any further consideration of the appropriateness of the punishment, must return a sentence of death. If mitigating factors are found, these factors are weighed against the aggravating factors found. If the aggravating factors are found to outweigh the mitigating factors found, the jury must recommend

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[2] The concept that a factor which one system can constitutionally tolerate might cause another system to be unconstitutional is by no means limited to the area of Death Penalty Sentencing procedures. As an example, twelve person juries are not constitutionally mandated and six person juries are appropriate and constitutionally sufficient. Williams v. Florida, 399 U.S. 78 (1970). While a majority verdict is acceptable in the context of a twelve person jury, Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972), a six person jury's verdict must be unanimous to pass constitutional muster.

death without further review. See Md. Ann Code Art. 27 § 413 (1987) Rep Vol.). Unlike the North Carolina Statute, Mayland prohibits jury consideration of the appropriateness of the death penalty when no mitigation is found; and, even where mitigation is found, affords very limited discretion in deciding the ultimate issue. Thus, when an otherwise reasonable burden of proof with respect to mitigation is placed upon a defendant under Maryland law, there is a substantial risk that the presumption that death is the appropriate sentence becomes unduly difficult to rebut. This transforms the statute into a mandatory penalty in violation of Woodson v. North Carolina, supra. In fact, it was on the basis of that argument that the Maryland Court of Appeals made its "saving" construction that evidence of mitigation remained legally relevant to be used by individual jurors in balancing factors in aggravation and mitigation even if the evidence of a mitigating factor had not been unanimously accepted by the jury. Mills v. State, 310 Md. 33, 527 A 2d 3 (1987).

North Carolina's capital punishment scheme, by contrast, has no requirement that the jury impose a death sentence if factors in aggravation are found, but the defendant fails to meet his burden of proving mitigation. A hold-out juror as to the existence of a factor in mitigation, then, cannot mandate a death sentence in North Carolina.

The sentencing scheme in North Carolina involves a four-step process in which the sentencer - always a jury - must first unanimously find the existence of one or more statutory aggravating factors unanimously and beyond a reasonable doubt. If aggravating factors are found, the jury must then unanimously find the existence of any mitigating factors by a preponderance of the evidence. Then the sentencer must balance the factors found against each other. If the sentencer finds unanimously and beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, the jury must then determine unanimously and beyond a reasonable doubt whether the aggravating factors found as diminished by the mitigating factors found are

sufficiently substantial to warrant imposition of the death penalty. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 cert. denied , 464 U.S. 865 (1983). Thus, there is not one but two balancing steps which must be resolved unanimously before the death penalty may be recommended by the jury in North Carolina. Each of the four steps must be recorded on an "Issues and Recommendation Sheet" so that the reviewing Court may, with confidence, determine what factors the sentencer employed in making the life or death decision. See State v. Noland, 312 N.C. 1, 320 S.E.2d 642 cert. denied 469 U.S. 1230 (1984). The North Carolina sentencing scheme, then, is a carefully structured system which possesses a far more finely tuned balancing process than does the Maryland sentencing structure; more significantly, it creates no presumption of death upon the finding of aggravating factors. Unlike under Maryland law, there is no danger in North Carolina that "a single voter could block such consideration [of mitigation], and consequently require the jury to impose the death penalty . . ." Mills v. Maryland, 486 at ___, 108 S.Ct. at 1870 (1988). (emphasis added).

North Carolina's sentencing law is distinct from that of Maryland not only due to its inherent safeguards against the arbitrariness so easily awakened in the Maryland statute, but also in its interpretation of its own law. Maryland has held that evidence of a mitigating nature remains legally relevant for use in the sentencing process even after a defendant has failed to carry his burden of persuasion to prove to the jury unanimously the existence of mitigating circumstances. Mills v. State, supra.

North Carolina, by contrast, has held as a matter of state law construction that evidence which arguably supports the existence of a mitigating factor becomes legally irrelevant for the two balancing steps in the capital punishment statute if it is insufficiently persuasive to convince all of the jurors merely by a preponderance of the evidence that a mitigating factor exists. State v. McKoy, 323 N.C. at 40, 372 S.E.2d at 34. See also, State v. Kirkley, 308 N.C. 196, 217-218, 302 S.E.2d 144,

156 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988). Thus, North Carolina specifically asserts in the context of its statute that which Maryland did not - evidence which is insufficiently reliable to convince all twelve jurors of the existence of a mitigating factor is legally irrelevant pursuant to State law. See Mills v. Maryland, 486 U.S. at ____, 108 S.Ct. at 1865, n.7. Skipper v. South Carolina, 476 U.S. 1 (1986) and Lockett v. Ohio, 438 U.S. 586 (1978), do not prohibit this type of relevancy determination. Skipper held the State could not determine what types of factors are relevant as mitigation. Lockett v. Ohio, supra, held that the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Neither Lockett nor Skipper purport to relieve a defendant of the burden of convincing jurors of the existence of a mitigating factor. In fact, in Franklin v. Lynaugh, 486 U.S. ___ , 108 S.Ct. at 2330 (1988), a plurality of this Court stated, "Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors . . .". The requirement in North Carolina that a mitigating factor be found unanimously is nothing more than the State's placing upon a defendant an evidentiary burden to prove his claimed mitigation to the jury by reliable evidence. To place such a burden of proof upon a defendant surely does not violate Lockett. In making the determination of whether or not a mitigating factor has been proved to exist, the sentencer necessarily considers all evidence proffered by a defendant in support of the mitigating factor. Thus, the only limitation on the jury's further use of the proffered evidence is that the defendant bear the evidentiary burden of proving the underlying facts which constitute a mitigating factor to a reasonable degree of certainty. Lockett ought not be read to prevent the State from requiring the defendant, as well as the State, to bear some burden of persuasion in the sentencing process.

If Mills stands for the proposition that the State can at no time remove from jury consideration initially relevant evidence, which subsequently fails to meet a reliability standard, then any instruction requiring the jury or individual jurors to hold the defendant to any standard of proof as to the evidence presented is just as violative of Mills and Lockett as the unanimity requirement. See Adamson v. Ricketts, No. 84-2069, ____ F.2d ____ (9th Cir. 1988) (limited en banc).

This Court, in Patterson v. New York, 432 U.S. 197 (1977), explicitly stated:

> [The Supreme Court] should not lightly construe the constitution so as to intrude upon the administration of justice by individual states . . . [I]t is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion . . . . If the state . . . chooses to recognize a factor that mitigates the degree of criminality or punishment . . . and the State may assure itself that the fact has been established with reasonable certainty." 432 U.S. at 201, 209.

See also, Leland v. Oregon , 343 U.S. 790, 798 (1952).

There is nothing so unique about a capital sentencing hearing that should cause this Court to construe Lockett as mandating an exception to the generally accepted principle espoused in Patterson concerning a state's right to assign a burden of persuasion to a defendant.

The twin central principles of Eighth Amendment jurisprudence are that the sentencer's discretion must be "controlled by clear and objective standards so as to produce non-discriminatory application," Gregg v. Georgia, 428 U.S. 153, 189 (1976), while allowing the sentencer to give "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Neither of these twin goals is undercut by placing a burden of proof on a defendant to prove the facts underlying a factor in mitigation to the satisfaction of the entire sentencing body before that factor is deemed present. The necessity for

application of binding evidentiary standards to a defendant's evidence as well as that of the State is not a callous attempt to make an individual defendant's task to escape capital punishment more difficult. Rather, it is an integral part of the capital sentencing structure which helps to promote reliability and uniformity among cases in the jurisdiction. Failure to have clear evidentiary standards on finding mitigating factors would allow jurors to indulge in whim or . . . . caprice on the basis of speculative evidence to spare a defendant. While individual decisions to grant mercy are not unconstitutional, Gregg v. Georgia, supra, uniform evidentiary standards which bind all juries in all cases help to avoid disparate results in capital cases. See, McCleskey v. Kemp, 481 U.S. ____, 107 S.Ct. 1756 (1987).

Chief Justice Rehnquist, in his dissent in Mills pointed out that, "the Court's reliance on Lockett v. Ohio . . . and Eddings v. Oklahoma . . . is misplaced. The issue here is not whether the jurors were permitted to hear all the extenuating evidence petitioner cared to present; they undoubtedly were. Rather, as in Brown or Jurek, the question is whether a reasonable juror operating under the trial court's instructions would have considered this evidence of mitigating circumstances in a constitutional manner." 486 U.S.____, ____, 108 S.Ct. at 1875.

Here, due to the differences in the Maryland and North Carolina systems, the unanimity requirement allows the jury to consider mitigating evidence in a constitutional manner. Death could not be mandated as the jury's recommendation simply because of a "hold-out" juror's failure to find the existence of mitigating factors. Thus, the principal reason to find this evidentiary burden unconstitutional-- the danger of transforming a sentencing structure into an arbitrary one--is not present in North Carolina. See Mills v. Maryland, supra.

The requirement that the defendant, like the state be required to shoulder a specific evidentiary burden fosters reliability. "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life

should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). Rather "in capital sentencing . . . discretion must be controlled by clear and objective standards so as to produce non-discriminatory application." Id., at 198; California v. Brown, 479 U.S. 538, 544 (1987), (O'Connor, J. Concurring).

The unanimity requirement, which ensures that every factor both in aggravation and mitigation used in making the balancing decision has been shown to exist to a reasonable degree of certainty, fosters "the Eighth Amendment's need for reliability. It helps to channel a sentencer's discretion with clear and specific guidance in such a way as to make the process rationally reviewable. Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The purpose of a jury is to "promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross section of the community." Burch v. Louisiana, 441 U.S. at 133. Each of these integral reasons for the jury to be a trier of fact at the guilt stage is equally compelling for a capital sentencing proceeding. cf, Spaziano v. Florida, supra. Each of the reasons for having a jury sentence the one is promoted by the unanimity requirement under system such as the one employed by North Carolina.

Group deliberation is obviously enhanced by the need for the jury to agree unanimously on the factors both in aggravation and mitigation. It is the discussion and debate over the existence of these factors that forces the jury to flesh out and examine the import of the evidence in light of all of the jurors' experiences and background. This debate permits the jury to give the factors the value necessary to make each of the factors a reliable component into the guided yet individualized inquiry into a defendant's moral culpability required by the Eighth Amendment. Informing each juror that he may consider whatever he desires in mitigation notwithstanding the view of his fellow jurors obviously detracts from the intensive group deliberation necessary to ensure a reliable sentencing decision. In fact,

such an instruction would free jurors from justifying to the others those factors the juror individually considered in reaching his ultimate decision.

A requirement that findings in mitigation as well as aggravation be unanimous likewise insulates each juror from outside pressure since all must agree and record each aggravating and mitigating factor found to exist. A single juror would feel less pressure to employ impermissible considerations such as race of the victim or the defendant when determining what factors mitigate if that juror knew his basis for decision must be unanimously agreed upon and recorded. See, e.g., Turner v. Murray, 476 U.S. 28, 35, (1986). Cf. McClesky v. Kemp, supra.

Finally, while not constitutionally required, Spaziano v. Florida, supra, jury sentencing in capital cases has wide acceptance among the states since "the imposition of the death penalty . . . is an expression of community outrage" and "the jury serves as the voice of the community." Spaziano, 468 U.S. at 461. Requiring that all jurors, in the case of a non statutory mitigating factor[3], agree that evidence supports a mitigating circumstance, requires the cross section of the community the jury represents to agree that the circumstance is, in fact, something society appropriately recognizes as being of a mitigating nature before it may be factored into the balancing equation. In the case of a statutory mitigating factor, requiring unanimity causes the community's cross section, based on the jurors' varied backgrounds, to conclude that evidence presented by the defendant is sufficiently credible in the community's view to support the existence of a factor. This requirement for common acceptance by all the jurors of mitigating evidence proffered by a defendance enhances reliability in sentencing. Failing to require unanimity would harm the fair

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[3] In North Carolina a statutorily prescribed mitigating factor must be considered mitigating if found to exist. State v. Kirkley, supra. As to non statutory mitigating circumstances proffered by a defendant, the jury finds both that the facts support the existence of the factor and that the factor is mitigating. State v. Fullwood, 323 N.C. 371, 394, 373 S.E.2d 518, 533 (1988).

cross section value of the jury as a sentencer since each juror would be free to exercise his own idiosyncratic beliefs as to what mitigates as opposed to being bound to consider only those circumstances which the jury--and by analogy the society it represents--all agree lessens the moral culpability of an individual for a crime. Rather than reflecting a reliable understanding of what society--as represented by the consensus of the jury--believes to be mitigating, judgments where unanimity is not required in mitigation as well as aggravation will be susceptible to individual whim and caprice.

Not only does unanimity in finding the existence of mitigation work to enhance the reliability of the jury's deliberative process, it also "insures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process." California v. Brown, 479 U.S. 538, 543 (1987).

North Carolina has proportionality review as a part of its mandatory appellate review of capital cases. N.C.Gen.Stat. § 15A-2000(d)(2) (1981). The pool of cases against which a capital case is compared includes all cases in which a sentencing hearing was held whether resulting in life or death. State v. Williams, 308 N.C. 47, 301 S.E.2d 335, cert. denied 464 U.S. 865 (1983). In making the comparison the Supreme Court of North Carolina does not engage in any type of statistical study. However, the Court does "compare the case at bar to other cases in the pool that are roughly similar with regard to the crime and defendant. . . . For this purpose the manner in which the crime was committed and the defendant's character, background, and physical and mental condition are relevant considerations." State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 486 U.S. ____, 108 S.Ct. 467 (1987). This type of searching review to ensure an individual's sentence is proportionate to other sentences received by other defendants and is not the product of arbitrariness, passion, or prejudice will obviously be severely hampered if the Court knows only what aggravating factors were found unanimously to exist and not what factors in mitigation were found to exist and used by

the jury in making the ultimate life or death weighing and balancing decisions. Thus, both during the sentencing hearing and during appellate review of the sentence, the reliability of the proceeding is enhanced in North Carolina by requiring the jury to find unanimously the existence of mitigating factors as well as aggravating factors before those factors may be used in the weighing and balancing process.

Certainly, the lack of a burden of proof on a defendant to prove mitigating factors would not enhance reliability in sentencing. To withdraw from the State the right to place an evidentiary burden of persuasion on the defendant under the theory that it precludes full consideration of mitigating evidence will deprive the state of any ability to shape and channel sentencer discretion. The only difference between this situation and the system found intolerable under Furman is that the class of persons to whom this unbridled discretion will be applied will be narrower (since one or more aggravating factors will have been found before mitigation evidence is examined.) Zant v. Stephens, supra. However, the result will be the same. Once aggravating factors have been found, each member of the jury would be free to engage in absolute open-ended, unfettered discretion in determining the existence of mitigating factors and what, in fact, mitigates. The disparate sentencing results to which this unchecked discretion could lead poses a dangerous obstacle to a fair and reliable sentencing system.

Mills v. Maryland dealt with the problems of unanimity instructions in the unique context of the Maryland capital punishment statute and the manner in which its state court interpreted it. However, unlike the situation in Maryland, a requirement that mitigating factors must be found unanimously to exist before the factors may be used in the further balancing procedures cannot have the effect of mandating a death sentence in North Carolina. The unanimity requirement is in accordance with North Carolina law defining legal relevance of evidence. The requirement promotes reliability in the sentencing proceeding and avoids the danger of opening jury deliberation once

aggravating factors are found to unfettered, open-ended, and largely unreviewable discretion by the jurors. Therefore, notwithstanding Mills v. Maryland, the unanimity requirement in North Carolina is an appropriate and constitutional allocation of a burden of proof.

Even if the distinctions drawn between the North Carolina and Maryland sentencing schemes, or the differences in state law concerning the continued legal relevancy of evidence which did not meet the burden of proof, do not automatically foreclose application of Mills v. Maryland, supra to the North Carolina sentencing instructions, this Court ought not summarily reverse this case. Due to the procedural posture in which Mills v. Maryland reached this Court, the issue to be decided in Mills dealt with whether or not the instructions given in Mills comported with the interpretation of Maryland law given by the Maryland Court of Appeals.

This Court has not had briefed the compelling reasons under a capital sentencing structure such as North Carolina's for requiring a defendant to carry a burden of persuading all jurors of the existence of a specific mitigating factor. Indeed, this Court has never reviewed the very real dangers involved in applying Lockett v. Ohio to cases which deal merely with evidentiary burdens of proof. See Adamson v. Ricketts, supra. (holding the Arizona statute unconstitutional because, among other issues, "Arizona Courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. This exclusion of relevant evidence at the weighing stage violates the principle established by . . . Lockett . . . that a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances." slip op. p. 68).

If Mills v. Maryland, supra, is to be expanded beyond the unique situation present in that case, the states will need clarification as to what types of evidentiary burdens to prove mitigation, if any, a defendant may now be held. The states will

also need guidance in how to channel the sentencing proceedings to avoid the unfettered, open-ended discretion forbidden by Furman once the death eligible line has been passed if Mills is to be read in the fashion suggested by petitioner.

CONCLUSION

In view of the differences between the North Carolina capital punishment procedure and that of Maryland, summary reversal of this case on the basis of Mills v. Maryland is unwarranted. The requirement in North Carolina that mitigating evidence, as well as aggravating evidence, be proved to the satisfaction of the entire jury promotes reliability and does not offend the principles of Lockett v. Ohio. Accordingly, certiorari should be denied.

Respectfully submitted this the 30 day of January, 1989.

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CERTIFICATE OF SERVICE

I, JOAN H. BYERS, Special Deputy Attorney General, do hereby certify that I am a member of the Supreme Court of the United States and that I have on this date served a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of record for Petitioner by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Robert S. Mahler
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This the 30th day of January, 1989.

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